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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Butte)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL MAGANA MONTES,

Defendant and Appellant.

C059188

(Super. Ct. No.  
SCR17049)

Defendant Manuel Magana Montes appeals from his conviction of escape by force or violence from a county jail (Pen. Code, § 4532, subd. (b); all further undesignated statutory references are to the Penal Code). He contends his counsel performed ineffectively by failing to impeach the prosecution's lead witness with his prior inconsistent testimony. We agree and reverse the judgment.

**FACTS AND PROCEEDINGS**

By an information filed on September 24, 2007, defendant was accused of escape by force or violence from the Butte County

jail on September 17, 1991, and of having served a prior prison term. (§ 667.5, subd. (b).)

According to the probation report, after being stopped for a traffic violation in another state on March 7, 2007, defendant was found to be a fugitive from California and transported to this state in custody.

The original complaint, filed shortly after the offense, alleged that defendant escaped along with Frank Andrew Moretto, Mark Allen Thompson, Charles Willis Scott III, and Joseph Proffitt, Jr.

#### *The Moretto Trial*

Moretto was arrested in November 1991 and thereafter convicted by jury of escape by force or violence. (*People v. Moretto* (1994) 21 Cal.App.4th 1269, 1271-1273 (*Moretto*).) We judicially notice our prior opinion. (Evid. Code, § 452, subd. (a).) In the Moretto trial the jury heard the following evidence:

"[O]n September 17, 1991, [Moretto] was incarcerated as a prisoner in the Butte County jail in Oroville. Early that morning he was in the kitchen assisting in the preparation of breakfast. [The victim], the civilian cook, arrived at the jail between 3:15 and 3:20 that morning. Five other prisoners were also in the kitchen on his arrival. Shortly after arriving, the cook unlocked the freezer compartment, storeroom and delivery room and began gathering items from the storeroom and bringing them into the main area of the kitchen. As the cook was

returning to the storage room for more supplies, two of prisoners [sic] 'jumped on my back and someone hit me in the back of the head, I don't know who it was.' The two prisoners, named Scott and Proffitt, drove the cook to the floor causing his head to hit the cement. These prisoners landed on top of the cook and began slugging him in the face with their fists. As he was being struck by these two prisoners, no other prisoner was seen in the immediate vicinity. But shortly after he tried to push Scott off, the cook saw three other prisoners, including [Moretto], standing near his legs. *He felt his legs being kicked but was unable to see who was kicking him.* Proffitt then stuck his hands in the cook's back pocket and extracted his keys. Proffitt then left the room but Scott still remained on top of the cook, continuing to strike him. The cook finally managed to push Scott off him and then Scott took off running. The cook lay on the floor 'trying to shake off the beatings to the face and I don't know how long I laid [sic] there. . . .' Eventually, he got up and discovered that five of the prisoners, including [Moretto], had escaped. On November 12, 1991, [Moretto] was arrested in Chico.

"At trial, [Moretto] testified he heard a loud slamming from the storage room while he was on cook duty. He walked through the delivery room door and discovered the door to the outside was open. [Moretto] denied striking the cook and denied seeing anyone else do so. When he saw the door was open, [Moretto] 'got the instincts to run and . . . did so' because he was 'caughten [sic] with drugs' and '[did not] want to go to the

penitentiary." (*Moretto, supra*, 21 Cal.App.4th at pp. 1272-1273, italics added.)

On our own motion, we have incorporated the record in the *Moretto* matter into the instant record. As to the evidence emphasized by italics above, in the *Moretto* trial, the victim testified in pertinent part as follows:

"Q. Other than the blows to your body being given by Mr. Scott [and] Mr. Proffitt, was there any other contact made with your body?

"A. I felt my legs being kicked.

"Q. And were you able to see who was doing that?

"A. No, I was not.

"Q. Were you able to see who was in the area of your legs when you felt them being kicked?

"A. Just the three. Be [sic] Monte[s] and Mark Thompson, *Moretto*." (Italics added.)

The trial court instructed the jury in the *Moretto* matter that it could convict even if *Moretto* did not personally use force or aid and abet its use, but merely took advantage of the situation created by others' use of force. (*Moretto, supra*, 21 Cal.App.4th at pp. 1273-1274.) We held that this instruction was prejudicially erroneous because the use of force is an element of the offense, observing that the jury was not instructed on the law of conspiracy. (*Id.* at pp. 1274-1278.) We reversed with directions to modify the conviction to simple escape or to retry the case on a theory of aiding and abetting. (*Id.* at p. 1278.) We chose the disposition because we found

"there was sufficient evidence, if believed by the jury under proper instructions, to convict defendant as an aider and abettor of forcible escape[.]" (*Id.* at p. 1278.)

*The present trial*

In this trial, heard by the court without a jury, the victim and a correctional officer testified for the prosecution; defendant and Moretto testified for the defense. Defendant was represented by appointed counsel, Mark Stapleton.

The victim testified that after Scott and Proffitt jumped him, drove him to the floor, and began to beat him, "I went to raise up to try to knock Scott off me, and *I seen three other inmates at my feet, and they started kicking me, and Montes was one of them.*" (Italics added.) He reiterated that defendant, whom he identified in court, "[w]as involved in kicking my feet and legs."

On cross-examination, defense counsel did not ask the victim about his testimony at Moretto's trial. Nor did he ask any questions which challenged the victim's ability to perceive who was attacking him.

Correctional Officer Robert Merwin, who was employed at the Butte County jail at the time of the escape, took the victim's statement about the escape. Merwin's testimony did not reveal what, if anything, the victim had said about defendant's actions.

Moretto testified that he was not retried after this court reversed his prior conviction; however, he admitted a felony

conviction for drugs, and the trial court recalled that it had convicted him of a second felony in a court trial. According to Moretto, when he got to the jail kitchen around 4:30 a.m. on September 17, 1991, the other escapees were already there at work. He and defendant walked to the back to get their job assignments, but no one was there and the back door was open to the outside, so "the escape pursued [sic]. We took advantage of the situation that had already taken place." Moretto did not see the victim assaulted by defendant or anyone else. By the time defendant and Moretto walked into the back storeroom, the victim was already "knocked out," lying on the ground, "black and blue," with "blood . . . coming out of his mouth." The other escapees were gone. If the victim testified that Moretto and defendant beat and kicked him, that was a lie.

Defendant testified that when he walked out the open door with Moretto he passed by the victim without even seeing him, let alone kicking him. He admitted he had been convicted of a felony drug offense before 1991.

Defense counsel argued that the victim, "set upon by surprise, sustained some fairly serious injuries . . . inflicted or sustained very quickly in the assault," which "severely impaired" his ability to perceive events. His account was thus "subject to some suspicion, *not in a pejorative sense, but merely because of the nature of the assault that he experienced*, and his ability thereafter to clearly perceive to [sic] identify people that may or may not have been involved in that escape."

(Italics added.) Counsel asked the trial court to convict defendant only of simple escape.

The trial court found: (1) The victim had positively identified defendant "and saw the defendant participating in the violent attack upon him, included [sic] kicking." (2) That testimony was credible; defendant's and Moretto's were not. (3) Therefore, defendant was guilty beyond a reasonable doubt.

### DISCUSSION

Defendant contends that counsel provided ineffective assistance by failing to obtain the record of the prior trial and to use it to impeach the victim with his inconsistent prior testimony. Although the record does not explain counsel's omission, defendant asserts that there can be no satisfactory explanation of the omission because challenging the victim's credibility was the only viable defense strategy. We agree that the issue is cognizable on appeal, counsel was ineffective, and that we are required to reverse the judgment.

To win reversal for ineffective assistance of counsel, a defendant must show that counsel performed incompetently and that a more favorable outcome was reasonably likely with competent counsel. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) If the record does not show why counsel acted as he did, the contention is cognizable on appeal only if there could have been no rational tactical purpose for counsel's conduct. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

Counsel could and should have obtained the transcript of the prior trial. Indigent defendants are entitled to such transcripts. (*People v. Hosner* (1975) 15 Cal.3d 60, 66.) Moretto's trial, even though it did not include defendant, obviously concerned his case. Since counsel planned to call Moretto as a defense witness in the present case, counsel had to know of the prior trial. Minimal investigation would have at least disclosed our published opinion, whose summary of the facts suggested a promising line of cross-examination. From there, appropriate preparation would have led counsel to the prior testimony of the victim. The victim was, after all, the person the prosecution was bound to rely on here to provide the court with the details of the assault. His testimony was crucial. In any event, through more than one route, counsel should have discovered that the victim could be impeached with his prior inconsistent testimony. (Evid. Code, § 1235.)

As defendant now argues, there was no other viable defense strategy than to argue that defendant was guilty only of simple escape because he did not use or aid or abet the use of force or violence. Without supporting evidence or an admission from the victim, counsel's "impaired perception" theory was an uphill battle at best. Common sense says that it would have been significantly aided by the victim's prior testimony that he could feel his legs being kicked but was unable to see who was kicking him. That testimony went to the pivotal issue in the case and directly contradicted the victim's testimony in this



trial that he saw this defendant kicking his legs. But counsel did not produce such evidence or elicit such an admission.

Thus, the case came down to a credibility contest between a victim with no apparent motive to lie and two convicted felons with obvious motives to do so. Furthermore, while the victim's story was simple and internally consistent, defendant's and Moretto's accounts contained an apparent discrepancy: though the two men seemingly had the same vantage point, Moretto claimed he saw the unconscious victim on the ground but defendant claimed he himself did not. Thus, this contest's outcome was largely foreordained.

To let the case turn on the victim's credibility without giving the trial court evidence to doubt it could not have been a rational tactical choice. If the trial court had learned that the victim had changed his story to defendant's detriment over 15 years after the fact, the court may have had reason to doubt the victim's credibility and thus the truth of the charge. It is reasonably likely that, had the court been presented with evidence that the victim said in the Moretto trial that he could not see who was kicking him even though he testified he saw defendant kicking him here, defendant would have realized a more favorable outcome of his trial.

The People assert that even had counsel known of the prior inconsistent testimony, he might reasonably have refrained from using it because harsh cross-examination of such a "sympathetic witness" as the victim could have backfired. We disagree. First, we presume that the trial court acting as the trier of

fact could maintain its objectivity regardless of counsel's tactics. Second, if the court had observed the victim caught in direct self-contradiction on a key point, the court might have found him a less sympathetic witness. Thus, if counsel actually had the ammunition with which to impeach the victim but decided not to use it, that decision was not tactically rational.

For all the above reasons, we conclude that trial counsel's performance was ineffective and that, but for counsel's ineffective representation, it is reasonably likely defendant might have obtained a better outcome. Reversal is mandated.

We turn then to the proper disposition of this matter. As in the trial of *Moretto*, defendant's guilt of the crime of simple escape was conceded, and the possibility that he might be liable for the use of force or violence as an aider and abettor was not litigated, although there was evidence to support defendant's criminal liability as an aider and abettor. The victim testified that defendant was present during the assault standing by the victim's legs. Therefore, the appropriate disposition is the same as that in *Moretto, supra*, 21 Cal.App.4th at page 1278: to remand with directions that the trial court either modify defendant's conviction to simple escape and resentence defendant accordingly or allow the People to retry the case on a theory of aiding and abetting.

#### DISPOSITION

The judgment is reversed with these directions: If the People do not bring the defendant to trial within 60 days after

the filing of the remittitur in the trial court pursuant to Penal Code section 1382, subdivision (a)(2), the trial court shall proceed as if the remittitur constitutes a modification of the judgment to reflect a conviction of simple escape in violation of Penal Code section 4532, subdivision (b), and shall resentence defendant accordingly.

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HULL, J.

We concur:

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RAYE, Acting P. J.

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ROBIE, J.